



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISCELLANEOUS CRIMINAL APPLICATION NO E020 OF 2021

DOMNIC WASONGA ODONGO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Applicant herein was tried and convicted for the offence of defilement contrary to Section 8(1) and (3) of the Sexual Offences Act No 3 of 2006. He was sentenced to serve fifteen (15) years imprisonment.

2. Being dissatisfied with the said decision, he lodged an Appeal in the High Court being, **HCCRA No 46 of 2014** which, on 11th May 2015, was dismissed in its entirety. The court therein substituted the fifteen (15) years custodial sentence with twenty (20) years imprisonment. The court directed that the sentence was to run from the date of the lower court's judgment. He did not appeal to the Court of Appeal.

3. On 15th February 2019, the Petitioner filed this Petition for review of the sentence. His application was supported by his Affidavit in which he prayed that this court overturns the Trial Court's decision and definite term of imprisonment be reached at or non-custodial sentence.

4. In his Written Submissions that were filed on 26th July 2021, he pleaded with this court to consider that he was arrested at the age of thirty (30) years and was the sole bread winner of his young family. He added that he had so far spent nine (9) years in prison. He urged the court to consider granting him an opportunity of shaping up his future which would otherwise be ruined by the long incarceration. He asserted that he was a first offender and very remorseful for having engaged in a criminal activity.

5. He submitted that he had undergone various transformation programs and acquired skills and attained Certificate and Diploma in theological bible studies and trade test grade III in masonry, tested by National Industrial Training Authority (NITA). He believed that the skills he had acquired would enable him get a legal earning and integrate well back to society.

6. The State opposed his said application on the ground that his case was so watertight and that there was overwhelming evidence against him. It added that the sentence meted was lenient and sufficient considering the circumstances of the case. It pointed out that the complainant was badly injured due to the injuries sustained from the act. Further, it argued that the Petitioner had not demonstrated to the court how the reduction will assist him and urged the court to dismiss his petition.

LEGAL ANALYSIS

7. It was not clear what was the basis of the Applicant's prayer for reduction of the case. This was not an appeal against the sentence. It did not appear to have been a case that was brought pursuant to the holding in the case of **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR** which in any event was inapplicable in defilement cases.

8. Suffice it to state that this court noted that in his judgment of 11th May 2015, Chemitei stated that the Applicant's act could only have been said to have been gruesome as he defiled a thirteen (13) year old minor at a bar and consequently infected her with HIV/AIDS.

9. Notably, Chemitei J had already pronounced himself on when the sentence ought to run. This was to be from the date of the lower court judgment. The provisions of Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya) were therefore not applicable in the circumstances of the case herein as this court could not purport to review and/or vary his decision and/or sit on appeal of his decision as both his and this court were of equal and competent jurisdiction.

10. This court's hands were tied by the pronouncement of Chemitei J of 11th May 2015 regarding when the Applicant's sentence was to commence. As the said Learned Judge had since left the jurisdiction of this court, the only option that was left to the Applicant herein was for him to appeal his decision of at the Court of Appeal

DISPOSITION

11. For the foregoing reasons, the upshot of this court's decision was that the Applicant's application for review of sentence that was lodged on 15th February 2019 was not merited and the same be and is hereby dismissed.

12. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF FEBRUARY 2022

J. KAMAU

JUDGE